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IN THE

Supreme Court of the United States

October Term, 1957

No. 33.

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

REPLY BRIEF FOR PETITIONERS.

I.

Respondents' Continued Insistence That Complaint Herein Seeks Judicial Relief for Interference With Contract Relations Rather Than for Abrogation of the Right to Work Permeates and Undermines All of Their Contentions.

Respondents' arguments are essentially the same as those which they advanced in opposition to the petition for the writ of certiorari. Virtually their entire argument is directed to the propriety of the grant of certiorari and the jurisdiction of this Court. The substantive issues are either totally disregarded or, in one or two instances, are only touched upon in passing.

The argument that this Court does not have jurisdiction to render a decision with respect to petitioners' claims is premised on a single thesis—that the complaint herein merely seeks legal relief for the unlawful deprivation of a specific contract of employment or the reasonable prospect thereof.

It is, of course, a general and necessary principle that this Court must determine for itself whether a pleading sets up a sufficient right of action, grounded on the Constitution or laws of the United States. (*First National Bank v. Anderson*, 269 U. S. 341, 345-346; *Brown v. Western Ry. of Alabama*, 338 U. S. 294, 296; *Davis v. Wechsler*, 263 U. S. 22, 24.) Respondents' argument cannot be squared with the plain allegations in the complaint [R. 29-41; P. B. 3-7][1] or with respondents' own summary of the complaint (I. R. B. 10-13)[2]

It is admitted by the demurrer filed by respondents that the conduct of respondents has wrongfully and unjustifiedly impaired the petitioners' reasonable expectation of employment in the motion picture industry[3] and their right *to pursue their professions and* occupations" therein [R. 35; I. R. B. 11, 18], and that "as a result thereof" and "by reason of" the acts and agreement of respondents, petitioners have been and they now are "refused" and *"excluded from employment in said industry"* [R. 36; I. R. B. 12]. It is total exclusion from all work opportunity, not the deprivation of a specific contract, which is

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[1]The reference "P. B." is to petitioners' opening brief herein.

[2]The reference "I. R. B." is to the brief of the industry respondents.

[3]An expectation obviously founded on the admitted high reputation and standing of each petitioner for excellence of work in the industry [R. 29].

the wrong committed here. Respondents' position that the complaint was properly dismissed because of the failure to allege a contract or prospect of one (I. R. B. 16) falls together with the erroneous assumption on which it is based. There can be no damage for interference with a contract if there is no contract. But the right to enter the employment market cannot depend upon the assurance of a contract of employment in advance. What petitioners have suffered here is not the relatively minor deprivation of a single contract but the total loss of all opportunity to obtain any contract of employment in the motion picture industry.

Respondents have avoided any discussion of the nature of the constitutional *right to work* (P. B. 21-31); or of the arbitrary action of the judicial arm of the State in denying all relief for an injurious invasion of *such* right (P. B. 31-50); or of the arbitrary denial by the State court of any protection for petitioners' freedom of speech and association from the monopolistic combination which conditioned the *right to work* on the surrender of these fundamental liberties (P. B. 51-80); or of the state court's refusal to afford any protection for the impairment of petitioners' rights as witnesses in a federal forum (depriving them of the *right to work* by reason of their conduct as such witnesses) under the supremacy clause of the Constitution (P. B. 81-92); or of the denial of the equal protection of the laws in the light of the state court's ruling holding in effect that the *right to work* (as distinguished from interference with contract relationships) is not a "legally protected interest" [R. 78; P. B. 92-106]. Respondents' arguments, as a result of their avoidance of the issues, are abstract and untenable.

II.

Respondents Have Not Shown That the Judgments of Dismissal Were Based Upon an Adequate and Independent Non-Federal Ground.

Respondents observe initially, buttressed by an array of decisions (I. R. B. 23-25), that this Court will ordinarily not review a state court judgment based upon an adequate and independent non-federal ground, a rule, to which this Court has constantly adhered. Conversely, however, "it is a necessary and well-established rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny [such] rights." (*Rogers v. Alabama,* 192 U. S. 226, 230. See, *West Chicago Street Railroad Co. v. Illinois,* 201 U. S. 506, 519-520; *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561, 580; *St. Louis S. W. Ry Co. v. Arkansas,* 217 U. S. 136, 148-149.) The latter rule is applicable under the facts here. Since the essence of the right asserted by petitioners was the right to seek and compete for employment (P. B. 21-31), the ruling which made the exercise of that right dependent upon the impossible condition of first obtaining a specific contract or prospect of one in the industry from which petitioners had been barred by respondents, necessarily resulted in forever foreclosing the assertion of the fundamental rights alleged in the complaint. The ruling of the state court is inseparable from its effect—the denial of *all* protection to a valuable property right, the right to work. Whether such an absolute denial by a state, particularly under the circumstances of this case, is consistent with constitutional guarantees presents important federal questions; ". . . where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment *without any decision of the other,*

our jurisdiction is plain." (Emphasis added.) (*Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164.)[4]

The decisions cited by respondents in support of the general principle governing this Court's jurisdiction actually illuminate the error in their own argument. A ruling by a state court, for example, that the writ of *coram nobis*, instead of habeas corpus, is the proper remedy to test a denial of constitutional rights is entirely independent of the federal questions involved because, rather than denying all remedy, it relates to the procedural form to be pursued in securing a remedy that does exist, and to the procedural steps or requirements with respect thereto. The same is true of state court rulings on estoppel, waiver, statute of limitations, proper forum, and other related matters (I. R. B. 23-25). But where the claim of a federal right, specifically set up from the very outset, goes to the root of the case and dominates every part of it, a state court ruling which necessarily has the effect of denying the claim of federal right on its merits, brings this Court's review jurisdiction into play. (*C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 580-581. See *Creswill v. Knights of Pythias*, 225 U. S. 246, 261; *Postal Telegraph Co. v. Newport*, 247 U. S. 464, 475; *Abie State Bank v. Bryan*, 282 U. S. 765, 773.)

The respondents argue that even if their conduct "were unlawful or unconstitutional" (I. R. B. 26), still, as the

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[4]That an important constitutional question was decided by the state courts is indirectly and inadvertently conceded by respondents when they note that the "sole ground" for the decision below was stated by the District Court of Appeal to be the "absence . . . of any legally protected interest of plaintiffs [which] has been interfered with" (I. R. B. 15). Whether or not the right to work, absent a contract of employment or definite prospect of one, is a property right protected by the Fourteenth Amendment is certainly a question arising under the Constitution of the United States.

state court held, the "causal connection" (I. R. B. 26) between such "wrongful conduct" and the "loss or failure to obtain employment" was not shown (I. R. B. 26). They urge that the judgments of dismissal are not reviewable by this Court since at most the state court ruling was simply "incorrect"; that in fact the ruling was not arbitrary or unfounded since it was "based upon a principle of the law of interference with business relations" (I. R. B. 28) and consistent with a general principle "that wrong and injury must combine" (I. R. B. 28); that only those who are adversely affected can complain of any wrongs done or unconstitutional acts committed (I. R. B. 29).

These arguments are premised on the thesis that the complaint herein seeks relief for interference with some specific contract of employment or prospect of one. Respondents simply ignore the allegations in and the patent theory of the complaint. (See *Boyd v. Thayer*, 143 U. S. 135, 181; *Carter v. Texas*, 177 U. S. 442, 447.) This suit is for interference with the pursuit of a calling, and respondents have admitted that by reason of respondents' conduct petitioners have been unable to enter the employment market and compete for contracts in the industry. The "causal connection" between respondents' conduct and this injury to petitioners' fundamental right to pursue their callings is plain, and is not denied by respondents, even in their brief here (I. R. B. 10-13, 18.)[5]

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[5]Respondents argue that ". . . it appeared from the complaint that any loss of employment or failure to obtain it by petitioner was the result of causes other than the conduct complained of." (I. R. B. 20.) They forget that in their own Statement of the Case (I. R. B. 10, 12) they say: "As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36.]"

That issue is not what power over local practice the State possesses with respect to the common law tort of interference with contract relations (I. R. B. 21), but whether the constitutional right to work—perhaps the most valuable property right an individual possesses—must be afforded by a state court the guarantees which the Constitution provides therefor. No rule of local law may be applied in such a manner as to deny these safeguards. What the State has done here is to require an allegation of damages of a contractual nature as a condition of a cause of action for invasion of a non-contractual property right.

If this ruling has merit, then a state for any reasons may deny a license to practice law; no federal question can arise as the applicant has sustained no injury because he does not have clients, the possibility of obtaining which is precluded by the denial of the application. The State's position could then be supported by the assertion that its action is merely a result of local practice. Obviously such a contention would be rejected there for the same reasons that it must be here.

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practices." (*Davis v. Wechsler*, 263 U. S. 22, 24.)

The ruling of the state court was unfounded because the requirement for damages it established is without necessary relationship to the injury sustained; so it properly may be regarded as essentially arbitrary and a mere device to prevent a review of the federal questions here involved (P. B. 21-31, 51-87, 92-106). (See, *Postal Telegraph Co. v. Newport*, 247 U. S. 464, 475-476;

American Railway Express Co. v. Levee, 263 U. S. 19, 21; *Hill v. Smith*, 260 U. S. 592, 594; *Young v. Ragen*, 337 U. S. 235, 238.) It is irrational and arbitrary and a denial of the equal protection of the laws for a State to protect an employment contract once acquired, but to leave unprotected by the law any right to acquire it. The constitutional right to seek a livelihood recognizes no such invidious distinction. At least, this Court has the jurisdiction to determine whether it does.[6]

III.

The Respondents Have Not Shown That the Federal Questions Were Not Seasonably and Properly Raised in the State Courts.

Petitioners have set forth in their opening brief a statement of how the federal questions were raised in detail and pursued in all the state courts (P. B. 11-14). Respondents now urge that "none of the federal questions" were raised or decided in the state court of first instance;

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[6]Respondents also argue that the allegations in the complaint of First Amendment violations are little more than conclusionary allegations of belief of the petitioners and are therefore not admitted by the pleadings (I. R. B. 11, 13). Of course, this was not any part of the basis of the state court's decision. In any event allegations upon information or belief such as these are specifically permitted under California Law. California Code of Civil Procedure 446; *Pridonoff v. Balokovich*, 36 Cal. 2d 788; *Roussin v. Stewart*, 33 Cal. 208. As for the allegations being conclusions rather than ultimate facts, it is necessary to go no further than to compare the ultimate facts alleged in the complaint here with the allegations held to be conclusions in the cases relied on by respondents to illustrate the fallacy of this contention: *Faulkner v. Cal. Toll Bridge Authority*, 40 Cal. 2d 317, 329: ("Allegations that the acts of a commission or board were 'arbitrary, capricious, fraudulent, wrongful and unlawful' "); *Callahan v. Broderick*, 124 Cal. 80, 82 (allegations that demands "are not lawful", are "for expenses not allowed to be paid out of said fund" and are drawn upon a fund under a section of law which is "unconstitutional and void"); *Gosewisch v. Doran*, 161 Cal. 511, 515 (allegation "that the publications charging him with misconduct were not pertinent or material").

that "none of them was raised," or decided in the State District Court of Appeal (I. R. B. 8). These sweeping assertions are unfounded, contrary to the record, and specious.

The respondents assert that the complaint was "not framed to raise or put in issue any right under the Constitution or laws of the United States," that "no federal right was alleged"; that "no provision of the federal Constitution or of any federal law was pleaded or otherwise referred to" (I. R. B. 3).

Contrary to respondents' blanket assertions, the complaint was framed to put in issue rights under the Constitution or laws of the United States. These included the right to follow a chosen calling [R. 9, 29, 35, 36]; the right to freely attend or decline to attend, if not summoned, hearings before a Congressional committee and to freely exercise before such committee constitutional privileges including First and Fifth Amendment privileges [R. 9, 35], and the right to freedom of speech and assembly free from coercion and interference [R. 9, 37]. The complaint alleged that the aforesaid rights had been invaded by respondents and sought legal and equitable relief.

California requires precisely such a concise statement of the *facts* showing how the constitutional questions arise; not a statement or conclusion of law governing the facts. (Code Civ. Proc. Sec. 426; *Callahan v. Broderick*, 124 Cal. 80, 82-83, 56 Pac. 782; *Vallindras v. Massachusetts, etc., Ins. Co.*, 42 Cal. 2d 149, 151, 265 P. 2d 907; *Scully v. State of California*, 20 Cal. 2d 178, 180, 124 P. 2d 609; *Foerst v. Hobro*, 125 Cal. App. 476, 478, 13 P. 2d 1055.)

The respondents demurred generally to the original complaint [R. 16]. The general demurrers were sus-

tained in a minute order without opinion, with leave to amend [R. 28]. The amended complaint was precisely the same as the original complaint, as respondents concede (I. R. B. 4, Fn. 2), except for the omission of two words—"blacklist" and "conspiracy"—which the trial court may have considered to be mere conclusions of law. Since the court had written no opinion and since the original complaint may have been dismissed solely because of the conclusionary allegations, petitioners exercised their right to amend.

In California, an amended complaint supersedes the original. (*O'Brien v. O'Brien*, 50 Cal. App. 2d 658, 660, 123 P. 2d 877.) The amended complaint, the one involved herein, asserted all the federal rights which had been asserted in the original complaint [R. 29-41]. Respondents again demurred generally [R. 41]. This time the demurrers of the industry respondents were sustained without leave to amend [R. 55], but with the rendition of a written opinion [R. 44-54].

The written opinion of the Superior Court, apart from its merits, is a complete refutation of respondents' arguments that "no federal right" was pleaded or put in issue in the lower court. The Court recognized that petitioners were asserting a right to pursue their chosen professions in the motion picture industry [R. 48]; a right to attend as witnesses in a federal forum and to invoke their federal constitutional privileges without losing their right to work [R. 52, 53]; and their rights to freedom of speech, press and assembly [R. 50-52].[7]

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[7]Apparently aware that the opinion of the Superior Court undermines their assertions, respondents state that "in California practice the memorandum opinion of a trial court cannot be used on appeal to impeach or vary its findings or judgment" (I. R. B. 6, fn. 5). Even if this were so, the opinion still reveals that the

The action of the trial court on dismissing the amended complaint was the first definitive action by the State. Respondents assert that petitioners failed to move to reconsider (I. R. B. 5), and therefore lost all right to complain thereafter. How baseless this argument is can be observed from the trial court's ruling. Respondents before the trial court urged that petitioners had not alleged the existence of any specific contract and that, in any event, respondents' admitted conduct was justified as a matter of law. On the only issue with which we deal here—the question of the need for pleading the existence of a specific contract—*respondents' objections were overruled and the petitioners' position was sustained* [R. 45, 48]. Respondents are, therefore, urging that petitioners, to save their rights, should have moved for reconsideration on an issue determined in their favor.[8]

In California, an order sustaining a demurrer without leave to amend is followed by a final judgment of dismissal of the action, reviewable on appeal. Where the errors complained of are errors of law, motions for reconsideration are ordinarily not required in the trial court, and the proper method of review is by appeal. (*Mattox v. Isley*, 111 Cal. App. 2d 774, 780, 245 P. 2d 664.) In

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federal questions were raised and argued in the trial court. However, Rule 5(a) of the Rules on Appeal (West's Ann. Calif. Code Rules) requires the clerk's transcript to include "any written opinion of the Superior Court," and such opinion can be used as an aid to the appellate court in ascertaining the process by which the judgment has been reached. (*Union Sugar Co. v. Hollister Estate Co.*, 3 Cal. 2d 740, 749, 47 P. 2d 273; *People v. One 1951 Ford Sedan*, 122 Cal. App. 2d 680, 683, 265 P. 2d 176.)

[8]Respondents recognize that petitioners were successful on their right to sue without the necessity of pleading the existence of a specific contract because they state that a judgment sustaining a demurrer to a complaint may be affirmed on appeal in California "regardless of the ground upon which the trial court may have sustained it." (I. R. B. 6, fn. 5.)

this case, in the light of the definitive written opinion of the trial court, and its refusal of leave to amend, it is plain that the only recourse was by appeal from the judgment which had been entered against petitioners, solely because they did not plead that respondents' conduct lacked justification.

In opposition to the petition for a writ of certiorari, respondents themselves stated: "In California practice, questions are raised on appeal in the briefs of the parties" (*Brief in Opposition*, p. 1, Fn. 1). Indeed, it is only in the briefs on appeal that errors can be urged. (*Rules on Appeal*, Rules 13-16.) Yet, respondents now claim that the briefs are not part of the record and that jurisdiction cannot be sustained by reference to the briefs (I. R. B. 35). Respondents appear to have overlooked that they themselves proposed a supplemental record in this Court containing the briefs on appeal, and this was done because, respondents asserted, the briefs were "necessary to ascertain when and in what circumstances the constitutional question posed here was raised below" (*Brief in Opposition to Petition for Certiorari*, p. 1, Fn. 1; see also, *Konigsberg v. State Bar of California*, 353 U. S. 252, 254-258).

Although respondents labor to prove that the federal questions presented in the District Court were of too much "generality" and "imprecision" (I. R. B. 36), they find it difficult to deny that both the respondents and the court were plainly and specifically advised that petitioners were asserting the deprivation of federal rights under the Constitution and laws of the United States (I. R. B. 36-37, Fns. 26, 27). It would unduly lengthen this brief to once again spell out the federal questions raised in the District Court of Appeal and supported there by references to the privilege against self-incrimination guaranteed by the fed-

eral Constitution, the Fourteenth Amendment and opinion of this and other Courts dealing with the constitutional rights here involved (see P. B. 12, 13). Suffice it to note at this point that deprivation of the liberty to pursue chosen callings, as distinguished from interference with a specific contract, in violation of the due process and equal protection clauses of the Fourteenth Amendment was repeatedly urged (Pet. Op. Br. in Dist. Ct. of App., pp. 7, 10-12, 18-21, 26, 41-42, 43;[9] Pet. Rep. Br. in Dist. Ct. of App., pp. 2-3, 10-11, 15-25, 31, 33-34, 37-38, 40-41, 44, 58-59, 60-61, 68); as were petitioners' rights freely to attend a Congressional hearing and to exercise their First and Fifth Amendment privileges in such federal forum. (Pet. Op. Br. in Dist. Ct. of App., pp. 21-23, 24-29, 29-33; Pet. Rep. Br. in Dist. Ct. of App., 61-62, 64); and the claim that petitioners' exercise of freedom of speech and assembly had been abridged (Pet. Op. Br. pp. 36-39; Pet. Rep. Br. pp. 10-12, 57-58, 60-61, 66); and that the State could not, consistently with the provisions of the Constitution of the United States, immunize and permit this monopolistic combine to deprive persons of their right to work solely because of the exercise of First and Fifth Amendment privileges in a federal forum (Pet. Op. Br. pp. 15-18, 21-36, 41-42; Pet. Rep. Br. pp. 40-41, 64-66). To all of this should be added that respondents in their own brief before the District Court of Appeal argued by way of reply each and every one of the aforesaid federal questions (Resp. Br. pp. 41-45, 59-78).

But, respondents argue, these constitutional issues were raised in connection with the question as to whether lack

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[9]Respondents in their reply brief answered the point "made by appellants of a constitutional 'right to work' and of the impairment of that right by the action of the respondents" (Resp. Br. in Dist. Ct. of App. p. 62) in part by renewing their argument, lost below, that petitioners had not pleaded the existence of a specific contract (Resp. Br. pp. 15-24).

of justification had to be pleaded by petitioners, and, therefore, they can not now be urged as applicable to the appellate court's ruling relating to the absence of a contract (I. R. B. 35-36). This contention overlooks the fact that the trial court had ruled in petitioners' favor on the contract issue and that the petitioners' emphasis was necessarily focused on the issue of justification on which they had lost rather than a matter with respect to which they had prevailed. Contrary to respondents' assertion that immediately upon the ruling by the trial court, the constitutional issues arising out of a ruling predicated on the failure to plead the existence of a contract could be perceived "without possession of any gift of prophecy" (I. R. B. 34), it would have required precisely such a capacity to anticipate that the Court of Appeal would ignore the reason for the trial court's ruling and would base its decision on a ground rejected by the trial court.

The decisions relied on by respondents on appeal and by the court below to support its ruling dealt exclusively with interference with contract relations and had no applicability to an action which sought to protect the right to pursue a calling, a right which the State had assured its citizens would always be protected. (*James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329; *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343.) The ruling of the District Court of Appeal, accepting for the first time respondent's position, was therefore in any event a surprise, and the constitutional questions raised in the petition for rehearing would therefore have been timely enough to invoke this Court's jurisdiction. (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 677.)

Moreover, the essence of the argument made below by petitioner was that the dismissal of the complaint and the denial of relief violated their constitutional rights.

Whether the ruling was on one ground or the other, it was the same constitutional rights that were involved and the claim of which was presented to the Appellate Court.

Respondents do not seriously challenge the fact that the federal questions arising out of the right to work and its relation to the issue of the need of pleading the existence of a specific contract under the due process and equal protection clauses of the Fourteenth Amendment were raised in the petition for rehearing (I. R. B. 8). Nor do they deny that the same questions were extensively pressed in the petition for rehearing to the Supreme Court of California (I. R. B. 7).[10]

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[10]The District Court of Appeal stated: "In view of our conclusion, we do not reach other points argued by counsel" [R. 77]. On rehearing, petitioners therefore again urged the unconstitutionality of the ruling which prevented consideration of the related federal questions. Respondents now suggest that the other federal questions raised and argued before the court, but not passed on as aforestated, should have been repeated in the petition for rehearing (I. R. B. 8, fn. 10) to permit consideration of the questions here. Respondents point to no state or federal requirement to that effect. Clearly, the necessary effect of the denial of the petition for rehearing, as in the original ruling itself, was to deny all the federal rights asserted in the complaint and throughout all the judicial proceedings. *C.B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 580-581. Although the petition for rehearing specifically alleged that the court's ruling denied petitioners their rights under the Fourteenth Amendment, respondents assert that in the petition for hearing to the Supreme Court respondents did not mention the specific constitutional provision in their claims of denial of due process of law and the equal protection of the laws (I. R. B. 7). Aside from the fact that the petition for rehearing is a part of the record before the Supreme Court (Rules on Appeal, Rule 28(b)), and aside from the fact that California does not have an "equal protection" clause (*Cf. New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 69), the contents of the extended petition and the citations of applicable decisions of this Court involving claims of federal rights under the Fourteenth Amendment amply establish that the claim of the invalidity of the ruling of the District Court of Appeal by reason of its contravention of the federal Constitution was clearly presented, as were all the federal questions here involved.

It is submitted, therefore, that respondents' position here is entirely untenable. The federal claims were seasonably brought to the attention of respondents and to the State court from the very inception of the proceedings, and diligently pursued throughout the state court proceedings. "And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (*New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.)

IV.

Respondents Have Not Shown That the Denial of Petitioners' Federal Rights Were Not Caused by the Action of the State.

On this issue, respondents have avoided any answer to petitioners' arguments in a number of significant respects. If the ruling of the court below denying all protection for the right to work to that class of persons who cannot show the existence of a specific contract is an irrational and arbitrary classification and a denial of the equal protection of the laws (P. B. 92-106), it cannot be successfully argued that this was "private action." Plainly the denial of the equal protection of the laws flows solely from the ruling of the judicial arm of the State. (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 682.)

In the second place, if petitioners had the right to freely attend as witnesses in a federal forum and exercise their privileges under the federal laws and Constitution, the protection of that right could not be denied by the judi-

cial arm of the State because the Constitution and laws of the United States are the supreme law of the land (P. B. 81-87). In such case, it is the supremacy clause of the Constitution which is invoked, and questions relative to the abridgment of rights by the State under the Fourteenth Amendment are not involved.

This Court's jurisdiction to review in the above instances has not been discussed by respondents. This question of "state action" with respect to these and other violations of constitutional rights has been extensively discussed in petitioners' opening brief (P. B. 31-50). We do not repeat the arguments here but they are, it is submitted, a refutation of respondents' contentions (I. R. B. 40-52). We make here only a few comments on some of the broad propositions advanced by respondents.

The respondents place great stress upon the distinction between judicial "enforcement" which results in the abridgment of federal rights, and judicial "denial" which results in the same abridgment of the same rights. They concede that if the admitted wrongdoers here had been foolhardy enough to ask the state court to "enforce" their concerted agreement and uphold their unlawful conduct, as a result of which the petitioners had been deprived of their right to pursue their chosen callings, then the State would have "acted" and this Court's jurisdiction to review would be plain (I. R. B. 43). But when the wrongdoer, a monopoly controlling all employment opportunities in the industry, by conspiracy, coercion and blacklist inflicts the same deprivations of fundamental rights, then the refusal of all relief and the immunization of the wrongdoers by the State judicial arm is not the "action" of the State, argue the respondents. This Court's jurisdiction to review the claimed deprivation of liberty and property under the

Fourteenth Amendment is thus made to turn on whether the wrongdoers went into court initially to obtain a license from the State for their wrongdoing, or whether they obtained their license from the State by successfully persuading the judicial arm to arbitrarily deny all legal and equitable relief to their victims. It is respectfully submitted that this Court's jurisdiction under the Constitution cannot be made dependent merely upon the location of the parties in the title of an action.

If constitutional rights are to be protected, the crucial question must be—what federal rights have been denied and what kind of wrong has the judicial arm of the State *sanctioned* in the particular proceedings? There is no constitutional right to some specific rental space, or to membership in a club or fraternity, or to employment in an "open shop" (I. R. B. 44, Fn. 32). But when an arbitrary ruling of the judicial arm of a State sanctions the admitted unlawful conduct of a monopoly which deprives persons of their right to pursue their chosen callings solely because of the exercise of federal privileges in a federal forum, it is simply unreal to argue, as respondents do, that the State has been "inactive." "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 682.) The exercise of the judicial power of a State must be exerted in subordination to the principles of "right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve," and an "arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practi-

cally sanctioned and the owner stripped of all real remedy, is wholly at variance with these principles." (*Truax v. Corrigan*, 257 U. S. 312, 329.)

The respondents argue that for this Court to take jurisdiction in these proceedings would require "an interpretation of the Amendment amounting to a reversal of the one which it has received from this Court since the *Slaughter House Cases*" (I. R. B. 43); that if the ruling and judgments of the Court below is the action of the State, "then all private conduct not prohibited by positive State law is state action" (I. R. B. 44). It is urged that the "furthest limits" to which "this Court has been willing to go are represented by the decisions in *Shelley v. Kraemer*, 334 U. S. 1; *Barrows v. Jackson*, 346 U. S. 249, and *Marsh v. Alabama*, 326 U. S. 501 (I. R. B. 45).

These generalizations on the part of respondents appear unjustified. There is no warrant for the conclusion that a ruling by this Court holding that the immunity granted by the State to *these wrongdoers* in *these proceedings* under the circumstances alleged in *this complaint* will destroy the "line between the sphere of State and Nation" (I. R. B. 42). The case herein is not merely one of "private conduct not prohibited by positive state law." It is state sanction of a highly injurious invasion of federal rights by a monopolistic combination exercising powers which belong to the state.

Respondents' analysis of the *Shelley*, *Barrows* and *Marsh* decisions appears narrow (see P. B. 37-41). Respondents recognize that in each of these cases there was action by the State, "through its courts or its legislature" which had the "effect" of putting behind the private agreements or conduct involved "the coercive power of the State" (I. R. B. 45). But respondents insist that the

coercive power must be manifested by the imposition of "civil or penal sanctions" (I. R. B. 45). It is submitted that such view is not only illogical but untenable if constitutional rights are to be protected. The coercive power of a State can be manifested in sustaining an action for damages or injunctive relief, and it can be equally manifested by denying such relief.

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to *exertions of state power in all forms.* And when *the effect of that action is to deny rights* subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." (*Shelley v. Kraemer,* 334 U. S. 1, 20 (emphasis supplied).)

Even if the technicality of whether the state has acted affirmatively or negatively were determinative here, respondents would be in no better position. Certainly if the state legislature were to enact a permissive statute covering the kind of conduct engaged in by respondents, that would be state action. Under California law the decisions of its courts, like statutes, become part of the total body of state law (Cal. Code Civ. Proc., Secs. 1895-1899, see Appx. A). Thus in handing down its decision in this case the District Court of Appeal promulgated law for the state just as effectively as if the legislature had adopted a statute. The state can no more disclaim responsibility for this action than it could if its legislature were to adopt a statute or its courts were to hand down a decision establishing immunity for all private assaults upon witnesses who exercise their constitutional privileges before a federal legislative committee.

Respondents' attempt to distinguish *Marsh v. Alabama*, 326 U. S. 501 (I. R. B. 46, 47), is self-defeating. If the State of Alabama had sanctioned "private" punishment by the company town for the exercise of First Amendment rights, instead of exercising its own coercive power, the violation of constitutional rights would have been more rather than less patent. Assuming that in *Konigsberg v. State Bar*, 353 U. S. 252, and *Schware v. Board of Bar Examiners*, 353 U. S. 232, the state had not acted directly but had permitted private associations to control the right to practice law and to exclude the petitioners in those cases from the bar, would the results in those cases have been any different because of the claimed absence of state action? The disclaimer of state action here stands on no better footing.

Respondents distort petitioners' arguments relative to the action of the State in sanctioning the conduct of the monopoly here in excluding persons from their chosen callings in the motion picture industry (I. R. B. 47, 48; P. B. 39-47). They assert that if petitioners were "denied the right to work except at the price of surrendering constitutional right," the denial was simply "the result of voluntary adherence to a voluntary private agreement" (I. R. B. 49). The record is to the contrary. The denial of the right to work became *legally* operative only when the State sanctioned respondents' conduct by declaring that it violated no rights which the court recognized and denying all relief to petitioners.

Respondents seem unable to understand that petitioners were "denied access to courts of the state" (I. R. B. 50). It is captious for respondents to assert that this statement is not correct because the "complaint was filed" and then dismissed (I. R. B. 50). Petitioners' complaint is that

the effect of the state court proceedings is to bar them forever from claiming any judicial relief against respondents' wrongdoing. In that sense, access to the courts has been barred.

The argument that the "motives" of the members of the House Committee is not involved herein is a contrived one. It is not the motives of the committee members of which petitioners complain, but their overt actions in joining the conspiracy alleged in the complaint (P. B. 45-47).

It is submitted that this Court has jurisdiction to review not only the claims of denial of the equal protection of the laws and the claims of denial of federal rights under the supremacy clause, but the claims of deprivation of the right to work without due process of law under the Fourteenth Amendment.

V.

Other Contentions Made by Respondents Are Irrelevant or Plainly Inconsistent With the Record.

1. Judicial Notice of Committee Proceedings Is Proper.

The respondents now urge that it is inappropriate to notice the proceedings of the House Committee on Un-American Activities (I. R. B. 12, Fns. 13, 18-19). In the court below respondents successfully urged the court (Resp. Br. in Dist. Ct. of App., pp. 46-54) to judicially notice that the questions put to petitioners in the legislative inquiry

> "had nothing whatever to do with their political affiliations, associations, or beliefs but concerned their membership in a conspiratorial and revolutionary junta, one of whose objectives is the overthrow of

> our government by force and violence, a malignant force which menaces the very existence of the government" [R. 68].[11]

Respondents do not deny that the arbitrary ruling of the court below was motivated considerably by matters involved in the proceedings of the House Committee and elsewhere of which the court took judicial notice (P. B. 87-93). Nor do they deny that but for this "judicial notice" the respondents' conduct would clearly violate Sections 1101 and 1102 of the California Labor Code, prohibiting discrimination in employment because of political activities.

Since this theory of judicial notice was successfully pressed in the court below, respondents are not in a position to draw the line in the same area at a point where the matters further noticed begin "to pinch." The question is not whether the matters noticed are true or false; the question is simply whether in fact claims of constitutional rights were made, whether censorial statements were made by respondents, whether there were calls for

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[11]The arguments made by respondents in their briefs below went along the following lines. "When the Complaint is Supplemented by Judicial Notice It Shows On Its Face Justification For Respondents' Alleged Agreement Not To Employ Appellants Who By Their Conduct Had Led The Public to Believe That They Were Communists" (Point III, p. 46). "The Proceedings and Reports of Congress and Its Committees, and Facts of Common Knowledge, Such as Prevailing Public Attitudes and the Manner in Which Ordinary Businesses Are Conducted, Will Be Judicially Noticed" (p. 46). "The Prevailing Attitude of the Public Toward Communism and Communists Will Be Judicially Noticed" (p. 49). "Judicial Knowledge Includes Notice of the General Nature of the Motion Picture Business and the Public Attitude Toward It" (p. 52).

blacklisting in the committee hearings, whether there were claims of loss of jobs as a result of respondents' concerted agreement (P. B. 53-59; Appx. B 5-88).

2. Rules of Local Procedure Cannot Override Federal Constitutional Rights.

The argument that no federal question arises from a decision of a state court "made in accordance with its established procedure" (I. R. B. 37) is irrelevant. As respondents concede, this rule prevails where the state court determines questions which do "not involve any right secured by the Federal Constitution" (I. R. B. 37).

3. Matters of Constitutional Rights Rather Than Economic Policy Are Determinative of This Case.

The argument that the state court by its ruling has merely adopted an "economic policy" which this Court should not disturb, lest there be a return to the "Lochner-Coppage-Adkins philosophy" (I. R. B. 38-39), has been treated in petitioners' opening brief (pp. 113-115). Respondents continue to avoid discussing the deprivation of the constitutional right to follow a chosen calling; the "economic policy" they are discussing involves suits for interference with specific contract rights. In any event, a denial of constitutional rights is not immunized from review by this Court by labelling such denial as an "economic policy."

4. The Denial of Equal Protection of the Laws Is Clear.

As to petitioners' claims of denials of equal protection of the laws (P. B. 92-106), respondents' only answer is that the classification is not unreasonable (I. R. B. 39, 40). It is stated that those who have no existing specific contract, "have not been adversely affected in the same way" (I. R. B. 40) as those who did have such specific

contracts. This statement flows from the premise that the cause of action here involved is one for interference with contract relations (I. R. B. 21, 40). If one does not possess such a relationship, there is nothing with which to interfere. But every person residing in the United States has the right to choose and pursue a calling regardless of whether he achieves a business relationship. Therefore to deny that right because of the absence of a business relationship is arbitrary and a denial of the equal protection of the laws. Otherwise a lawyer would be entitled to protection against unjustified interference with his relations with a single client, but his claim to a right to practice law would involve no legally or constitutionally cognizable right.

5. The Clear Denial of Due Process With Respect to First Amendment Rights Is Properly Before This Court.

Respondents urge that questions dealing with denial of "free speech and association under the First Amendment" and the "right to appear as a witness before Committees of the Congress" are "new questions in the cause" and "outside the scope of the questions presented in the petition for certiorari" (I. R. B. 52). That these questions were raised and pursued throughout the proceedings had been discussed in "II" *supra*. That they were raised and subsumed within the questions set forth in the petition for writ of certiorari are demonstrated by respondents themselves (I. R. B. 52, Fn. 38; see also, Rules of Supreme Court, Rule 23(c); see also, Petition for Writ, 3-4, 29-33). On the merits, the respondents decline discussion, stating only that if the aforesaid rights were denied, the "vital element" of state action "is wanting" (I. R. B. 53).

Of course the First Amendment is not *directly* invoked in this case (*cf.*, I. R. B. 53, 54). Presented here is the question whether the state violated the due process clause of the Fourteenth Amendment insofar as, among other things, it refused to protect First Amendment rights encompassed by the Fourteenth Amendment. There can be no doubt of the proposition that were the state to condition the right to pursue a calling upon the surrender of First Amendment rights, the due process clause would be violated. The situation is no less clear when the state sanctions the conduct of a monopolistic combination of private individuals in usurping the power of control over pursuit of a calling within an entire industry and conditioning the right to work therein upon such surrender of constitutional rights.

6. Due Process Has Been Denied With Respect to Fifth Amendment Rights.

So, too, with respect to violation of Fifth Amendment rights (see, I. R. B. 54), the state violates due process when it establishes a policy which in effect delegates to private individuals the power to condition pursuit of a calling upon the surrender of such rights. For just as the state may not consistently with the due process clause discharge an employee solely because of his exercise of the Fifth Amendment privilege against self-incrimination (*Slochower v. Board of Ed. of N. Y.*, 350 U. S. 551, 559) so it may not establish a rule of law granting to private individuals the power to exclude persons from the pursuit of a calling in an entire industry because of the exercise of that constitutional privilege.

7. The Pleadings Clearly Alleged Exclusion From All Work Opportunities by Reason of the Conspiracy Charges.

Respondents state that the District Court of Appeal based its decision

> "upon the *sole* ground that it did not appear from the complaint that the alleged exclusion of petitioners from employment in the motion picture industry was the result of the monopolistic and discriminatory combination among the defendants averred; . . ." (I. R. B. 5).

This construction of the complaint cannot be reconciled with the pleadings on their face [R. 36] or as analyzed by respondents themselves. Thus in their Statement of the Case the respondents accurately summarize a portion of the complaint as follows:

> "As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36]" (I. R. B. 12.)

The analysis of the complaint to the effect that it alleges no such exclusion can be justified only if pleadings may be construed as meaning the opposite of what they plainly say.

8. The Committee Respondents Are Liable for Their Private and Official Acts in Furtherance of the Conspiracy Into Which They Admittedly Entered.

In reply to the brief of *amicus curiae*, the argument is advanced that the complaint does not specify what was done by the Congressional Committee respondents in their

official capacities and what in their unofficial capacities; accordingly, the argument continues, it must be presumed that the official acts were not the wrongful acts complained of (A. C. R. B. 3).[12] This argument is bottomed on a complete disregard of the allegations of the complaint. It is there alleged and accordingly admitted here that with respect to the matters alleged in the complaint these respondents acted in *both* capacities [R. 8]. Patently it was possible for these respondents to take official action in support of the blacklist conspiracy charged and *also* to participate in their private capacities in that conspiracy. This is precisely what the complaint charges and what is admitted here.

Respondents also urge that the Congressional Committee respondents may not be held responsible for what they are alleged to have done in their official capacity because of their constitutional immunity (A. C. R. B. 10-12). The immunity argument must fall for two reasons. First, the complaint does not allege that the official action of these respondents was limited to things said or done in a session of the House or of the Committee. Although the Court can take judicial notice of the fact that some of the conduct complained of took place during sessions of the Committee it does not follow that all of it did. If respondents' contention is that their conduct was so limited, that is a matter of defense to be appropriately raised in the state court.[13] Second, even with respect to what is said at Committee hearings, the immunity ends when the

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[12]Referring to "Brief for Industry Respondents in Reply to Brief for Amicus Curiae."

[13]There is nothing before this Court to indicate that the state law requires an allegation in the complaint negating the possibility that official acts were within the area of immunity. And, of course, this is not the basis of the state court's ruling.

bounds of legislative powers are exceeded and the functions of the Judiciary or the Executive are usurped. (*Tenney v. Brandhove*, 341 U. S. at 367-378.) Here the Committee acted as a legislature *and* as a court performing both functions simultaneously while sitting in judgment on individuals for violating standards which it set. Regardless of what their motives may have been, what they did—the taking of steps to put the blacklist into effect pursuant to the conspiracy—[14] was in excess of the powers of these respondents. For their excesses the Constitution provides no immunity.

9. The Supremacy Clause of the Constitution Is Applicable Here.

Respondents also argue in their brief in reply to *amicus curiae* (A. C. R. B. 13-16) that the supremacy clause does not "compel recognition of a cause of action for alleged private interference with the self-incriminating privilege" (A. C. R. B. 13); that Congress has not acted to protect the privilege against private interference and Congress is not required to so act. It follows, argues respondents, that the states have no obligation to do that which even the federal government has not done.

The difficulty with respondents' position, if it were otherwise meritorious, is that it distorts the case here. The basic federal right involved here is the right of per-

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[14] It is urged that Committee member respondents may not be held responsible for what their predecessors or colleagues said and did (H. C. R. B. 8, fn. 5). This is so, *unless* the respondents adopted and continued the policies and program previously established by the Committee and endorsed by their colleagues. In any event the full implication and effect of what respondents said and did can best be weighed and understood in the context of the Committee's history and record. When this is done, the fact that respondents participated in a course of action to blacklist petitioners is made very apparent.

sons *to attend as witnesses in a federal forum* and freely assert privileges secured to them by the Constitution of the United States. It is doubtful that such a plain federal right requires the enactment of a federal law before it can be protected from private interference, but the Congress has enacted laws relative to the attendance of witnesses before legislative committees and this Court has time and time again emphasized the right of witnesses under the Constitution of the United States to invoke the guarantees of that fundamental law (P. B. 81-85).

The supremacy clause and federal public policy embodied in federal legislation does require that the state grant relief against private action which penalizes individuals for their exercise of the federally guaranteed rights here involved. For such private action interferes with the functioning of a branch of the federal government and with the performance by petitioners of their duties to the federal government. The respondents' assertions to the contrary are supported by no authority other than three cases holding that the privilege of the Fifth Amendment may be fully satisfied by a grant of immunity, regardless of other consequences that may flow from compelled testimony[15] (A. C. R. B. 4, 14) and simply ignore those cited by petitioners (P. B. 86-87).

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[15]These cases deal with the right of the *federal government* to substitute immunity for the privilege, because the privilege does not offer protection against the *consequences of testimony*, unrelated to possible criminal prosecution. This is a far different thing from holding that private individuals may conspire to impose a penalty upon a person because of the lawful manner in which he has testified and relied on his privilege before a federal tribunal. There may be no constitutional protection accorded against the incidental effect of testimony lawfully obtained; such protection certainly exists against those who deliberately combine to deprive a person of his property and liberty because of his performance of a duty to the government in a manner of which they disapprove.

Petitioners argue that 18 U. S. C. 241 only applies to citizens and that it is inapplicable here because there is no allegation of citizenship of petitioners (A. C. R. B. 16). Section 18 U. S. C. 242 (a criminal statute not limited in its application to citizens), also relied on by petitioners is disregarded by respondents. These two sections were cited by petitioners (P. B. 86) not as being in and of themselves the basis of the complaint but rather as indicating the policy of Congress that private individuals should not be allowed to interfere with the exercise of federal rights and privileges. This indication of policy supplements and strengthens the general principle applicable to this case that a state has the duty under the supremacy clause to protect, against private interference, individuals who are exercising federal rights and performing federal duties. (*Cf., Brewer v. Hoxie School District No. 46*, 238 F. 2d 91, 103-104.)

VI.

The Remaining Respondents Clearly Demonstrate by Their Argument the Validity of Petitioners' Position.

The respondent Committee members and investigators have simply chosen not to answer petitioners' arguments (P. B. 116, 117). They devote some portions of their brief to a reiteration of arguments made by the industry respondents (R. R. B. 4-8, 14-17).[16] They then argue that no cause of action is asserted against them in their official capacities (R. R. B. 8-12), and that none could be asserted against them in such official capacities (R. R. B. 12-14).

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[16]The reference "R. R. B." is to the brief of the remaining respondents, Doyle, Jackson and Wheeler.

On the other hand, these respondents are clear that they have been charged in the complaint with acting in their individual and non-official capacities. They ask this Court to "take judicial notice that such acts [the acts charged in the complaint] are no part of the official duties of Congressmen and employees of Congressional Committees" (R. R. B. 11). They repeatedly insist that their admitted acts were "not within the scope of their official duties" (R. R. B. 3). If this be so, then respondents here are in precisely the same position as the industry respondents.[17] Indeed, they received the same grant of immunity from the state court as did the industry respondents. For all of the reasons discussed in petitioners' briefs, this Court has jurisdiction to review the judgments of dismissal with respect to these respondents as well as the industry respondents.

Respectfully submitted,

ROBERT W. KENNY,

BEN MARGOLIS,

Attorneys for Petitioners.

SAMUEL ROSENWEIN,

Of Counsel.

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[17]However, as we noted above, respondents admit that they participated in the conspiracy charged both officially and in an unofficial capacity.

APPENDIX A.

Section 1895, California Code of Civil Procedure. LAWS WRITTEN OR UNWRITTEN. Laws, whether organic or ordinary, are either written or unwritten.

Section 1896. WRITTEN LAWS DEFINED. A written law is that which is promulgated in writing, and of which a record is in existence.

Section 1897. CONSTITUTION AND STATUTES. The organic law is the Constitution of Government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

Section 1898. PUBLIC AND PRIVATE STATUTES DEFINED. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

Section 1899. UNWRITTEN LAW DEFINED. Unwritten law is the law not promulgated and recorded, as mentioned in Section 1896, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts, and the treatises of learned men.